Cominco Alaska Incorporated/Red Dog Mine/P.O. Box 1230/Kotzebue, Alaska 99752/Tel. (907) 426-2170

MEMORANDUM
October 29.1999

Cominco Alaska
A Subsidiary of Cominco American Incorporated

To: Chuck Findley, EPA Region X
From: Charlotte MacCay. Cominco Alaska Incorporated

Re: EPA's Oversight of the ADEC PSD Permit for the Red Dog Mine

EPA requested that Cominco Alaska Incorporated submit an analysis of the specific economic impacts of requiring SCR at the Red Dog Operations with a projection of the cost per unit of production related to the costs of installing and operating SCR on the new Wartsila engine. Cominco Alaska strongly feels that BACT decisions should not, according to EPA's own guidelines, consider specific economic impacts or profitability. Accordingly, as well as for additional concerns related to confidentiality, Cominco Alaska will not be providing this analysis. However, as I mentioned at our recent meeting in Anchorage, I will submit the general economic status for Cominco Alaska.

The capital investment required to construct the Red Dog Operations remains a considerable debt to be recovered. At this time, we are roughly $400 million dollars in debt on this investment. Additionally, due to an unexpected drop in zinc prices around the time that the mine was commissioned Cominco Alaska lost over $150 million dollars in operating costs. During this same period of time, over $50 million dollars of additional capital costs were invested in environmental improvements. While the last couple of years have proven to be profitable, Cominco Alaska's overall debt remains quite high.

Industrial development in rural Alaska is essential for one of the poorest regions of the state and nation. However, it is difficult to attract industrial development to this region due to the high investment required to overcome the lack of infrastructure and the lack of regional power. While industry in the rest of the nation enjoys available regional power, often provided through federal funding for rural electrification, we in rural Alaska do not have this basic provision. Here, development requires the unusual cost of constructing a power generation facility. The imposition of higher cost air quality controls for power generated by private industry over power generated by public utilities creates a cumulative and uncommon economic burden.

Cominco Alaska believes the State of Alaska has the specific understanding to make the BACT decision for the Red Dog Operations. We also believe the State has the authority to make this decision. We respectfully supply the attached memo regarding EPA's role in oversight of the approved PSD program.

Sincerely,

Charlotte L. MacCay
Senior Administrator, Environmental and Regulatory Affairs

HOLLAND & HART LLP
555 SEVENTEENTH STREET, SUITE 3200
P.O. BOX 8749, DENVER, CO 80201-8749
PHONE: (303) 295-8000 FAX: (303) 295-8261

MEMORANDUM

October 29, 1999

TO: EPA Region 10

FROM: Bob Connery
Larry Volmert

RE: EPA's Role in Oversight of Approved State PSD Programs and Standard of Review for State PSD Permitting Actions

In the context of the draft PSD permit prepared by the ADEC for the Red Dog Production Rate Increase, the question has arisen what is EPA's authority and responsibility to oversee the ADEC's action, what standard should EPA apply in reviewing an approved State's PSD permits, and what is the proper forum for resolving differences between a State and EPA concerning PSD permit conditions.

I. STATUTES

The key statutory provisions are:

113(a)(1) of the Clean Air Act (CAA), which provides that when there is a violation of "any requirement or prohibition of an applicable implementation plan or permit", EPA may issue an order to comply or an administrative penalty order or file a civil action.

113 (a)(3) of the CAA, which provides that when there is a violation of any other requirement of Title I (which would include PSD), or various other CAA provisions, the EPA has the same options, plus it may request the Attorney General to bring a criminal action.

113 (a)(5) of the CAA, which provides that when the EPA finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating

to the construction of new sources or the modification of existing sources, EPA may issue an order prohibiting construction of a major source in any area to which such requirement applies, issue an administrative penalty order, or bring a civil action for penalties.

Section 167 of the CAA, which provides that EPA may issue an order or seek injunctive relief as necessary to prevent the construction or modification of a major emitting facility "which does not conform to the requirements of this part (meaning Part C governing PSD)".

II. OTHER AUTHORITIES

The most similar case to Red Dog is *U.S. v. Solar Turbines, Inc.* 732 F.Supp. 535 (M.D. Pa. 1989). Solar submitted a PSD application to the Pennsylvania Department of Environmental Resources (PADER) which contained all required information, including a BACT analysis, and responded to PADER's requests for additional information. PADER proposed to authorize Solar's turbine design as BACT, and not to impose a water or steam injection system for NO_x control, although that was technologically feasible. EPA submitted comments to PADER regarding BACT. The final permit was issued without requiring water or steam injection. EPA filed an action for injunctive relief under section 167 and civil penalties under Section 113. EPA argued that there was no basis for PADER's failure to require water or steam injection, and that this violated the PSD rules. Applying the *Chevron* standard of whether the agency's interpretation of the statute was a permissible one, the court held that EPA cannot as a matter of law pursue enforcement against an owner who has committed no violation other than to act in accordance with a permit issued by an authorized permit-issuing authority. The court stated that the enforcement provisions of the CAA provide that a violation is to be assessed against objective standards (*e.g.*, failure to apply for a permit), not based on a disagreement between EPA and a state agency about the terms of the permit. The court was unwilling to allow the permittee to be caught in the crossfire between agencies. It also was impressed with the fact that there was no way for Solar to have avoided the alleged violation. EPA argued that Solar could have simply reapplied to PADER for a

permit and obtained one that complied with the CAA. Said the court, "PADER's violations are, however, outside the control of Solar." The court characterized EPA's action as a veto of the permit and noted that, unlike the Clean Water Act, which includes explicit permit veto authority, the CAA contains no such veto authority. The court also noted that EPA may have had the option of pursuing the state under Section 113(a).

U.S. v. Campbell Soup Company, 1997 WL 258894 (E.D. Calif.) reached a different result, but on different facts. Campbell modified can manufacturing machines between 1983 and 1988 without permits. In 1992, the Sacramento air district issued permits for these modifications. In 1995, EPA filed an action for civil penalties, because neither BACT nor offsets were required in these permits. Campbell argued that EPA could not sue for penalties until the permits had been declared invalid. The court noted that this case presented the question whether operating under a permit that failed to impose requirements under a SIP is a violation. Distinguishing *Solar Turbines, supra,* as having been based on Section 167, the court held that there is no categorical bar to enforcement action by EPA if there is a SIP violation, even if there is a state permit. In *Campbell,* however, it appears the permitting agency did not require offsets or do a BACT analysis at all. Thus, the facts are fundamentally different than *Solar Turbines* or Red Dog, where the State has made all required determinations, including BACT, and the only dispute is whether the State's judgment is right.

U.S. v. Ford Motor Co. 736 F.Supp 1539 (W.D. MO 1990) involved Kansas City's ozone SIP, which contained limits on the VOC content of paints and surface coatings. However, it also provided for the possibility of Alternate Compliance Plans (ACPs), if approved by the State, which allowed compliance on a plant-wide averaging basis. The State approved an ACP for the Ford plant. EPA filed a civil action for penalties and injunctive relief, alleging violations of the SIP. The court stated that Ford had presented compelling evidence that it was in compliance with the ACP. EPA argued it had the right to approve the ACP but had not done so, and therefore the plant was in violation. The Court found that this contradicted the language of the SIP, approved by EPA, which gave the State the right to approve ACPs. EPA also argued that the

approved ACP did not provide equivalent BACT emission reductions as the SIP, did not meet the requirements for an ACP and thus was a SIP revision which had to be approved by EPA. The discussion in the court's opinion is instructive:

> We must presume, absent evidence to the contrary, that Missouri exercised its discretion in good faith. Accordingly, if this grant of authority is to remain vital, it is this Court's opinion that judicial review of these plans, at least on the grounds and in the context advanced by EPA, must be precluded.
>
> The Court has no quarrel with the United States' assertion that an ACP may not permit VOC emissions greater than those permitted by an approved SIP. This much is obvious from the ACP provision of Missouri's SIP and the Act itself. It would serve little purpose to enact a SIP only to have it undermined case-by-case by ACPs that permit excessive emissions. However, the Court does not view the equivalence of these two plans as the central issue. The issue raised by the EPA's argument is how the EPA can attack what it perceives to be a defective ACP. Obviously, the EPA believes it can pursue this issue in an enforcement action against the source. The Court disagrees. It is this Court's opinion that because EPA delegated authority to Missouri to approve ACPs, and because Missouri acted in good faith in approving the plan, EPA's only recourse if it believes the ACP is substantially inadequate to attain NAAQS is to pursue revision of the ACP through administrative procedures.
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> . . .
>
> This state approval would be meaningless if EPA could collaterally attack the plan in a judicial or administrative enforcement action.

(Emphasis added) at pp. 1548-49

U.S. v. AM General Corp., 34 F.3d 472 (7th Cir. 1994) held that EPA's enforcement attempt under Section 113, alleging a failure by the local permitting agency to require LAER or offsets under Part d, was invalid. The basis for the holding was somewhat narrow — that the source had modified its facility pursuant to the permit before EPA issued a funding of violation. The court did say, *in dicta*, that

> we cannot find in the text of the Clean Air Act, or elsewhere, any indication that Congress expressly or by implication meant to authorize the EPA to mount a collateral attack on a permit by bringing a civil penalty action as many as five years after the permit had been granted and the modification implemented.

III. ANALYSIS

In both *Solar Turbines* and *Ford Motor Co.*, the courts found that where EPA had approved a State program and the State had exercised its discretionary authority pursuant to that approval, EPA could not unilaterally override the State's determination. Certainly, EPA could enforce only if there were a violation, and a case-by-case judgment made by a permitting authority pursuant to an EPA-approved program is not a violation. In analyzing whether there is a violation as to the BACT determination specifically, it is useful to examine the definition of BACT, at Section 169 of the CAA:

> an emission limitation based on the maximum degree of reduction . . . <u>which the permitting authority, on a case-by-case basis</u>, . . . determines is achievable . . .

In this case, the PRI is subject to BACT, as determined by the permitting authority. We believe that when the permitting authority makes a case-by-case determination on BACT, it is doing precisely what the CAA requires and thus there can be no violation enforceable by EPA under Section 113 or 167. If EPA disagrees with the ADEC's case-by-case determination, its recourse is to appeal that determination pursuant to ADEC's administrative procedures. This is exactly what the District Court said in *Ford Motor Co.* The Seventh Circuit in *AM General* also envisioned such an appeal as a method for EPA to resolve differences with a State's exercise of discretionary judgment. At pp. 474-75. Of course, EPA also has an option under Section 113(a)(2) of the CAA to take back an approved program from a State if it finds widespread failures on the State's part to enforce the program effectively. For EPA, however, to unilaterally substitute its judgment for the State's would dishonor the EPA's approval of the State program in the first place, as observed by the court in *Ford Motor Co.*

Finally, it is instructive to examine decisions of EPA's Environmental Appeals Board in appeals from BACT decisions made by delegated states, where there is no approved state PSD program but EPA has delegated to the state the administration of EPA's PSD program. Those cases uniformly state that the standard of review applied to State BACT decisions is whether the State decision is clearly erroneous. The EAB will review such decisions "only if a permit decision was based on a clearly erroneous finding of fact or conclusion of law, or if the decision involves an important matter of policy or exerciser of discretion that warrants review. *In re Knouf Figer Glass, GmbH*, 1999 EPA App. LEXIS 2, PSD Appeal Nos. 98-3 *et seq.*, Feb. 4, 1999; *Accord, In re Maui Electric Company*, "The power of review should be only sparingly exercised," and "most permit conditions should be finally determined at the [permitting authority] level." 45 Fed. Reg. 33,290, 33412 (_____ 9, 1980), cited with approval in *In re: Knauf Figer Gloss* and *In re: Maui Electric Co., supra*. If EPA will override a state's BACT decision, only when there is clear error in a *delegated* state, it follows, a *fortiori*, that EPA should not override a State's decision for anything less than clear error in a PSD-approved state. Since EAB review does not apply in an approved state, the appropriate forum for determining whether there has been clear error appears to be the State's administrative appeal process, as noted above.

IV. CONCLUSION

EPA should challenge the ADEC's BACT determination and/or other PSD permit conditions only if it believes ADEC has committed clear error. If it chooses to pursue such a challenge, the appropriate forum would be the State's administrative appeal process.

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